STATE OF MICHIGAN

COURT OF APPEALS

JOHN GALLAGHER and SHERYL GALLAGHER, Plaintiffs-Appellants, v CONSUMERS ENERGY COMPANY, Defendant-Appellee, and TREES ACQUISITION, INC., Defendant.	UNPUBLISHED June 3, 2010 No. 289092 Kent Circuit Court LC No. 06-010826-CZ

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Plaintiffs John and Sheryl Gallagher filed a one-count complaint against defendants Consumers Energy Company and Trees Acquisition, Inc., alleging that defendants trespassed on plaintiffs' residential property and wrongfully cut trees and brush owned by plaintiffs.[1] After a seven-day trial, a jury returned a special verdict finding that Consumers Energy, through its agent Trees Acquisition, had either negligently or through good faith mistake trespassed on plaintiffs' property and wrongfully cut trees; the jury awarded plaintiffs damages totaling $11,828. Plaintiffs appeal as of right from the trial court's entry of judgment effectuating the jury verdict. We affirm in part, reverse in part, and remand for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS

[1] Plaintiffs settled their claim against Trees Acquisition, Inc. before trial.

Plaintiffs in November 1998 purchased a triangular, nearly six-acre parcel of property located at 6911 Rix Road in Ada. The property included a residence and a nature trail that extended for about a half-mile along the outer border of plaintiffs' parcel, adjacent to utility poles and wires and a bordering tract of railroad-owned property. In an amended complaint, plaintiffs averred that without notice to them, Trees Acquisition, at the direction of Consumers Energy, "clear cut approximately 8128 square feet of trees and bushes from areas along approximately 500 linear feet along Plaintiffs' previously private walking and nature trail." The complaint characterized that the trespass and tree cutting by Consumers Energy and Trees Acquisition occurred "intentionally, recklessly, and wantonly . . . [because] Defendants knew that the property and the trees belonged to Plaintiffs and that Defendant[s] had no right to take these actions."

Plaintiffs theorized at trial that Consumers Energy had disregarded the terms of an easement that their predecessors in title had granted. The recorded easement, conveyed by E. Leonard and M. Orpha Galloway on June 3, 1993, vested in Consumers Power Company, "its successors and assigns, and its and their agents and employees the easement and full right and authority to enter at all times upon" the entirety of 6911 Rix Road. After describing the boundaries of plaintiffs' property, the easement contained the following specifications:

> Also conveying to [Consumers Power], its successors and assigns, and its and their agents and employees, the full rights and authority to enter at all times upon said premises for the purpose of servicing said electrical lines including constructing, repairing, removing, replacing and maintaining such towers, poles and other supports, with all necessary braces, guys and anchors (in present location) and transformers, and stringing thereon and supporting and suspending therefrom lines of wire or other conductors, for the transmission of electrical energy, and to trim or top any tree within 20 (twenty) feet of said electrical lines and further to trim or top any tree which endangers or may endanger said electrical lines. Before topping or trimming any tree, [Consumers Power] is to provide Grantors with two weeks advance notice to enable Grantors to be present when the work is performed. This notice does not apply in emergency situations.
>
> [Consumers Power] is prohibited from placing any new additional structures on the above described premises beyond what is currently there, however modifications of current structures are specifically allowed and changes in configuration are specifically allowed as long as these changes do not lower or extend further over Grantors' property the electrical lines that are on or overhanging the above described premises.
>
> Grantors hereby agree to provide and maintain a reasonable roadway suitable for vehicle traffic (including bucket trucks and other non-four wheel drive vehicles) along the entire length of said electrical lines. If Grantors fail to provide and maintain this roadway, then [Consumers Power], its successors and assigns, and its and their agents and employees, hereby have full rights and authority to provide and maintain said roadway along said electrical lines. [Consumers Power] shall use said roadway only to gain access to said electrical lines.

Plaintiffs and two of their sons testified at trial that they had frequently used and enjoyed the privacy of the nature trail at the rear of 6211 Rix Road, until they returned home from a July 2005 vacation to find a significant portion of the trail destroyed. John Gallagher and his sons recalled that they spent a lot of time manicuring and maintaining the trail, which Gallagher estimated was on average between eight and nine feet wide and comprised of trees and bushes 10 to 12 feet in maximum height. John Gallagher denied that Consumers Energy (1) had the right to cut any trees or bushes in conformity with the easement because none of the trees and bushes approached 20 feet of the Consumers Energy power lines, and (2) attempted to notify him of its intent to perform the July 2005 trimming.

John Gallagher offered extensive testimony about his repeated measurements of the improperly cleared area of trees and bushes, which totaled just over 8100 square feet. In the conservative estimation of John Gallagher and two of his sons, Trees Acquisition cut at least 1600 trees and bushes, including hundreds of smaller trees with diameters of two inches or greater; plaintiffs introduced a computer-generated graph or map showing areas of different tree concentrations, in some of which John Gallagher and his sons had counted the number of trees present in a small area and then extrapolated that number over more extensive areas of seemingly similar tree density. Although John Gallagher conceded that he had not commissioned a survey of his property line bordering the railroad right of way to the north, he explained that he felt certain about the location of the border of 6911 Rix Road and that plaintiffs' property encompassed the entire nature trail and the Consumers Energy utility poles:

> *Plaintiffs' counsel*: Do you know exactly where the property line was along the railroad tracks on your property?
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> *Gallagher*: Yes, I do.
>
> *Plaintiffs' counsel*: And how do you know that?
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> *Gallagher*: From the first day I walked down there with the previous owner, and he's very adamant where everything was. We went around the entire property and he pointed out the stakes in the corner and I looked right at them.
>
> *Plaintiffs' counsel*: And . . . you saw stakes, saw a fence?
>
> *Gallagher*: Yeah. There's a fence that is in line with the stakes, which is generally in line with the telephone poles—they're not really in line, but they're fairly close. They follow along the same line, and there's—the fence was one of these wire fences.

A Trees Acquisition truck foreman who participated in the July 2005 tree and brush trimming near the utility poles and high voltage wires behind plaintiffs' residence reviewed the work order Trees Acquisition received from Consumers Energy, which instructed Trees Acquisition to clear a 40-foot distance from each side of the electric wires, as Consumers routinely requested. The work order made no mention of an easement or special restrictions and identified the utility poles as resting on railroad property. Plaintiffs introduced at trial portions of a deposition given by Kenneth Klumpp, a Consumers Energy technical assistant. Klumpp believed that Consumers Energy frequently scheduled utility-related tree and brush trimming

without checking for special or particular easement conditions. Klumpp added that before plaintiffs' lawsuit, Consumers Energy did not have in place a broad system of easement compliance or review procedures, and that if he had known of plaintiffs' easement he would have apprised Trees Acquisition of the restrictions therein.

Plaintiffs presented several witnesses to substantiate their damage claims. Scott Ullery, a landscape estimator and nursery manager, testified that on an August 2005 visit to the area of the tree cutting at 6911 Rix Road he counted and measured the larger tree stumps. Ullery did not count the high number of smaller trees and shrubs apparently cut, but referred to the computer generated diagram prepared by John Gallagher and his sons. Ullery described that he ascertained the species of the felled trees (aspen, cherry, elm, maple, oak) and shrubs (dogwood, honeysuckle, sumac and viburnium) by investigating the bark on the remaining trunks and stems. Ullery's estimate to restore the landscaping to its precutting status totaled $245,304.[2] Plaintiffs also elicited testimony from an asphalt company president who estimated that the cost to repave plaintiffs' driveway after it suffered damage from heavy landscaping equipment would cost $7,053. A sprinkling company president opined that a temporary irrigation system to nurture the 1600 newly planted trees and shrubs, which the landscaping company required for warranty purposes, would exceed $30,000, and that plaintiffs' would require a new well on their property to satisfy their water needs. A well drilling company president figured the cost of installing a new well and pump on plaintiffs' property at $9995.[3]

Consumers Energy presented testimony concerning the value of plaintiffs' tree loss from Robert Arthur Cool, a state-registered forester and internationally certified arborist. Cool recounted that he made four visits to the cleared tree area of plaintiffs' property, and that he and an assistant arborist carefully examined the entire area along "[b]oth sides of the [nature] trail," "counted every tree and shrub that was cut," and measured the diameters of the cut tree trunks.[4]

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[2] Ullery's estimate total included 1409 shrubs at $32.75 each, 242 trees of varying sizes at costs between $325 and $1,200 each, heavy equipment for planting the trees, 629 hours of labor for tree and shrub installation at $58 an hour, plus additional tree, shrub, equipment and labor costs to repair damage that the landscaping company would create by moving necessary heavy equipment to the site.

[3] Plaintiffs sought treble damages pursuant to MCL 600.2919(1).

[4] Cool elaborated:

> We virtually looked at every square foot from the railroad line to the path, across the path, over to the slope, and then up the slope toward the south, looked at every square foot and looked at every disturbance, and then if there was a piece of tree laying there in this windrowing of the trees, we had to find that stump for it.
>
> Windrowing . . . means cut the trees off and lay them down out of the way. It's a common practice by utilities and in nonmaintained areas, such as farmland and rough woods, and so forth.

Cool and his assistant counted 144 total tree trunks, 44 of which exhibited "more than one year of sprout growth on them" showing that they had been cut before 2005; from what Cool described as "a selective cut of the trees" that took place in July 2005 Cool found 100 trees. Of the 100 trees cut in 2005, Cool subtracted 17 trees that he viewed as standing in the path of an access roadway mentioned in the Galloway-Consumers Power easement, yielding 83 trees for his damage figures.

Cool testified that he employed two separate damage calculation methods: the trunk formula method and the appraised cost method. In Cool's opinion, the trunk formula method best approximated the reduction in value to plaintiffs' property that resulted from the July 2005 tree cutting in a typical wooded area like that surrounding the nature trail, a nonlandscaped setting distant from plaintiffs' residence. Cool initially placed the area of the nature trail into the category of "woodlands," explaining,

> Well, technically, it was a, except for the mowing on the trail, it was just a scrub area, is what real estate people call it, and I think it's a term that some people recognize. It was not planted. It was not maintained, none of the trees or shrubs. Mother nature was allowed to have her way with them, with predation by animals, and so forth.
>
> And . . . it was a long ways from the house. You could not see the house from the trail, at least this part of the trail where the easement was at.
>
> And the rule on location, right around your house is most important. Those trees and shrubs and that landscaping is like gold, and it's the most important, and if you go further away from that, so far away you can't even see it, you can't continue to appraise at those same high values because it will result in betterment.

In brief, the trunk formula calculation began with an average tree price ascertained from a survey of tree prices in the Michigan landscaping industry, which Cool then adjusted for multiple variables, including among others the tree species, trunk diameter, the condition of the surrounding trees still present, and the location of the tree on a parcel of property. After making adjustments for the species, condition, and location variables, Cool's trunk formula damage total for the 83 trees Consumers Energy had cut totaled $645; the jury's eventual award of damages matched the $11,828 figure Cool had estimated before he made the adjustments for species, condition and location variables.[5]

[5] Although Cool counted at least 80 shorn shrubs, he did not assign them any value given that the area around the trail "was overrun with shrubs that had not been cut," the shrubs would value "less than the trees, . . . and anything that was cut was resprouting and, of course has resprouted greatly by now." Consumers Energy submitted into evidence photographs of shrub regrowth that Cool took in September 2007 and August 2008.

Randal J. Vugteveen, a director of surveying at Nederveld and Associates, Inc., testified that he participated in a boundary survey of 6911 Rix Road. According to Vugteveen, his survey showed that the Consumers Energy utility poles stood on the right of way owned by a railroad, not plaintiffs' parcels,[6] and that most of the nature trail ran also along the railroad property. Vugteveen denied that he noticed any prior stakes or other markers related to any survey of the 6911 Rix Road property border adjacent to the railroad right of way. When questioned about a discrepancy of about four feet between the deed description of 6911 Rix Road and Vugteveen's survey measurements of the property line that 6911 Rix Road shared with the railroad right of way, Vugteveen characterized that surveys "very common[ly]" varied somewhat with legal descriptions of property "especially along right-of-ways, but this . . . discrepancy here has nothing to do with the proximity to the railroad." Vugteveen further explained that "that's partly due to the fact that mathematically the legal description doesn't close . . . , which is another very common situation in legal descriptions."[7]

The jury returned the following special verdict:

> We, the jury, answer the questions submitted as follows:
>
> QUESTION NO. 1: Have the Plaintiffs proved by a preponderance of the evidence that Consumers Energy thru its agent, Trees, Inc. cut trees that were located on Plaintiffs' property without permission or authority?
>
> YES.
>
> * * *
>
> QUESTION NO. 2: How much money will reasonably, fairly, and adequately compensate Plaintiffs for the trees cut from their property without their permission?
>
> $11,828.00
>
> * * *
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> QUESTION NO. 3: Has Consumers Energy proved by a preponderance of the evidence that it was merely negligent or that it acted with good faith or

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[6] Vugteveen figured that the three utility poles were placed between 17 feet and 23 feet of plaintiffs' property line.

[7] In rebuttal, plaintiffs called a licensed surveyor, Steven Green, who described generally that occasionally boundary measurements differed from available legal descriptions of property. When plaintiffs' counsel inquired whether Green might have included anything else not reflected on Vugteveen's survey, Green responded, "The only thing I can really notice I would put different on there is, I would show the physical center of the [railroad] tracks." Green did not specifically dispute the accuracy of Vugteveen's survey.

under an honest belief that it had the legal right to do the acts Plaintiffs seek compensation for?

YES.

II. LACK OF OWNERSHIP DEFENSE

Plaintiffs initially aver that the trial court should have precluded Consumers Energy from disputing at trial the location of their property line, a defense that plaintiffs maintain Consumers Energy abandoned or waived by neglecting to adequately raise it in any motion or responsive pleading. "Decisions concerning the meaning and scope of pleadings fall within the sound discretion of the trial court." *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

To sustain plaintiffs' trespassing claim, the only count of their complaint, they had to prove their right to exclusively possess the property that Consumers Energy purportedly invaded. "In Michigan, recovery for trespass to land is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Terlecki v Stewart*, 278 Mich App 644, 654; 754 NW2d 899 (2008) (internal quotation omitted). "A party against whom a cause of action has been asserted . . . must assert in a responsive pleading the defenses the party has against the claim. A defense not asserted in the responsive pleading or by motion as provided in these rules is waived . . . ." MCR 2.111(F)(2).

Both parties on appeal invoke *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307; 503 NW2d 758 (1993), in support of their positions concerning the adequacy of Consumers Energy's dispute that plaintiffs' owned all the trees for which they sought compensation. In *Stanke*, *id*. at 316, this Court examined "what degree and with what specificity an ordinary, or 'negative,' defense must be pleaded" under MCR 2.111(F)(2).

> . . . [T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposing party to take a responsive position. . . . [*Stanke*, 200 Mich App at 317.]
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> With these ideas in mind, we believe that the appropriate interpretation of the court rule [MCR 2.111(F)(2)] is that an answer must be sufficiently specific so that a plaintiff will be able to adequately prepare his case, just as the complaint must be sufficiently specific so that the defendant may adequately prepare his defense. Just as the plaintiff must plead something beyond a general the "defendant injured me," the defendant must plead something more specific than "I deny I'm liable." In the case at bar, defendant's answer, although not laying out in exacting detail every theory defendant could possibly allege regarding why there was no coverage, did plead something more specific than "we are not liable." Namely, defendant's answer specifically denied that Roy Clothier was an "insured" and further denied that there was coverage under the policy at issue. We view this pleading as being sufficient to satisfy the court rule. Had defendants endeavored to present a defense that involved an issue other than

> whether there was coverage under the policy, then, perhaps, defendant's answer would have been inadequate to preserve such a defense. [*Id*. at 318.]
>
> * * *
>
> In the case at bar, defendant's answer has satisfied its purpose: it notified plaintiff that defendant was disputing Roy Clothier's status as an insured and that the policy involved provided coverage for this accident. . . . [*Id*. at 319.]
>
> In sum, because the issue is whether the Camaro is nonowned and whether there is a genuine issue of material fact concerning that question, we conclude that defendant did not have to plead that issue with any specificity beyond denying that coverage exists. Because one element that plaintiff would have to establish was that the automobile was nonowned, there is no surprise that he would have to prove that element at trial . . . . Because nonownership represents an element plaintiff would have to affirmatively prove in order to prevail on his claim, it represents an issue that would reasonably be the subject of discovery and other preparations in advance of trial. . . . [*Id*. at 320.]

With the guiding principles of *Stanke*, 200 Mich App at 318-320, in mind, we conclude that the responses contained in the answer and amended answer filed by Consumers Energy sufficed to place plaintiffs on reasonable notice that Consumers Energy might dispute the extent of plaintiffs' property and tree ownership. Consumers Energy admitted "on information and belief" plaintiffs' preliminary allegation in their original and amended complaints that they owned a parcel of property located at 6911 Rix Road. In answer to plaintiffs' position that defendants clear cut more than 8100 square feet of trees and brush on plaintiffs' property, Consumers Energy initially responded that it "lack[ed] knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph and therefore leaves Plaintiff to its proofs," though Consumers Energy later replied to the same allegation in the amended complaint that it "denie[d] the allegations in this paragraph as untrue." Consumers Energy replied in the same respective manners to plaintiffs' contention that "[f]ew, if any of the trees cut were within 20 feet of the electrical line." In setting forth a trespass on land count, plaintiffs averred that Trees Acquisition, an agent of Consumers Energy, "trespassed on Plaintiffs' property without Plaintiffs' knowledge and permission," which Consumers denied as untrue in answer to the original and amended complaints. Consumers Energy further disputed the veracity of the next two paragraphs of plaintiffs' trespass count, specifically that "[w]hile trespassing, Defendants cut down trees and vegetation on the property and damaged it in other ways associated with tree cutting," and that "[d]defendants' trespass, tree cutting, and other damage to the Property were done intentionally, recklessly, and wantonly when Defendants knew that the trees belonged to Plaintiffs and that Defendant had no right to take these actions." Consumers Energy additionally maintained in its affirmative defenses that it "had permission to be on the premises" and "to the extent that Defendants exceeded that permission, Defendants' trespass on the property was casual and involuntary." In summary, in light of (1) plaintiffs' responsibility to prove as an element of their trespass claim that they had an exclusive right of possession to the areas in which defendants purportedly trespassed, and (2) Consumers Energy's consistent denials of the elements of plaintiffs' trespass claim, the trial court did not select an outcome falling beyond the range of principled outcomes by allowing Consumers Energy to dispute at trial the extent of plaintiffs' property and tree ownership.

III. INTRODUCTION OF TESTIMONY BY UNDISCLOSED DEFENSE EXPERT WITNESS

Plaintiffs next insist that the trial court should have denied Consumers Energy's motion to offer at trial testimony by an expert surveyor, whom neither Consumers Energy nor Trees Acquisition identified in any witness lists or answers to interrogatories. We review for an abuse of discretion a trial court's decision whether to allow a party to introduce testimony by an unlisted lay or expert witness. *Duray Dev, LLC v Perrin*, ___ Mich App ___; ___ NW2d ___ (Docket No. 287722, issued 4/13/10), slip op at 11; *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992). "Abuse of discretion exists when the trial court's decision falls outside the range of principled outcomes." *Duray*, slip op at 11.

"The ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts which might be admitted into evidence at trial. The purpose of witness lists is to avoid trial by surprise." *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993) (internal quotation omitted). Although a party seeking to present testimony by an unidentified witness generally must establish "good cause" supporting his request, MCR 2.401(I)(2), trial courts retain the discretion to permit testimony by unlisted witnesses. *Butt v Giammariner*, 173 Mich App 319, 321-322; 433 NW2d 360 (1988); *Pastrick v Gen Tel Co of Michigan*, 162 Mich App 243; 412 NW2d 279 (1987); *Elmore v Ellis*, 115 Mich App 609, 613-614; 321 NW2d 644 (1982). "Trial courts should not be reluctant to allow unlisted witnesses to testify when the interest of justice so requires. This is especially so with regard to rebuttal witnesses." *Elmore*, 115 Mich App at 613-614.

A week before trial commenced, Consumers Energy filed a motion to introduce at trial "evidence from Nederveld Associates, Inc. . . . about [a] September, 2007 survey" of 6911 Rix Road. Consumers Energy described the survey evidence as "essential to the jury's ability to determine both liability and damages in this case," in light of deposition testimony by plaintiffs reflecting their position that the utility poles behind 6911 Rix Road stood on plaintiffs' property. Consumers Energy emphasized that the September 2007 survey established to the contrary the utility poles' location on railroad-owned property adjacent to plaintiffs' parcels, and that plaintiffs could claim no prejudicial surprise arising from the proffered evidence given that (a) on August 22, 2007, Consumers Energy filed a request to enter onto plaintiffs' property "for the purposes of conducting a land survey and inspection," and (b) the survey later occurred "in the presence of both Mr. Gallagher and his counsel." Plaintiffs urged against the admission of any survey-related evidence on the grounds that Consumers Energy had filed no witness list, the witness lists filed by Trees Acquisition made no reference to a surveyor, and plaintiffs thus "have no opportunity to depose . . . [the surveyor] and no opportunity to garner a rebuttal witness." Plaintiffs did not dispute that John Gallagher and plaintiffs' counsel were present when the survey took place, but presumed "that survey went nowhere and [Consumers Energy] had no intention to delve into surveys since . . . [it] subsequently made no mention of the surveyor and provided no documentation." Plaintiffs criticized the survey as facially erroneous because it conflicted with the legal property descriptions of 6911 Rix Road, and irrelevant because monuments present at the site for many years located the border of plaintiffs' property irrespective of the survey.

The trial court withheld a ruling on the Consumers Energy motion until the fifth day of trial. The court explained as follows that it would allow Consumers Energy to introduce the survey and testimony by Vugteveen:

> . . . I'm given to understand, on the first objection raised that it is in violation of the scheduling order, that whether and how this potential witness's identity was revealed to the plaintiff [sic] as compared to how plaintiff's experts who testified were identified and revealed to the defense.
>
> And I am convinced from not only what I was informed, but my definitive review, that while there may have been a lack of precision with particular names mentioned, nonetheless, the fact that a person who in this case conducted a survey would be incorporated as a class of people to testify, gives notice in like manner sufficiently, as plaintiff [sic] gave notice of the categories of their experts to the defense.
>
> In addition, while Mr. Boncher [plaintiffs' counsel] apparently was not the individual present when this potential witness was present on the plaintiffs' property, someone from his office was there and I am assuming that a person of reasonable competence, of which Mr. Boncher is blessed in terms of his staff, at a minimum, have communicated to him that this person was there for a particular purpose, namely, a survey.
>
> So concerning notice, I'm content to say that the objection is unavailing.
>
> There were a number of cases cited to me . . .
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> And I'm content, based upon my own interpretation of these cases, that they have a different factual and legal, importantly different legal context . . . .
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> * * *
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> In any event, I do believe that there's sufficient notice. I believe that the cases are distinguishable from the specific factual circumstance we have here, and the objection to this witness is noted but respectfully denied and the defense may call this person.

After reviewing the record and relevant case law, we cannot characterize as an abuse of discretion the trial court's decision to permit Vugteveen to testify on behalf of Consumers Energy with respect to his September 2007 survey of 6911 Rix Road. As the trial court noted, plaintiffs and their counsel plainly had awareness of the Consumers Energy survey of their property, communicated through Consumers Energy's filing of the August 2007 request to enter onto plaintiffs' property to perform a survey and plaintiffs' concession that John Gallagher and someone for his counsel's office watched the September 2007 survey in progress. Plaintiffs' attendance of the Consumers Energy survey in progress substantially diminished any element of surprise arising from Consumers Energy's motion to permit Vugteveen's testimony and the survey's introduction, notwithstanding Consumers Energy's neglect to have forwarded the survey to plaintiffs or included Vugteveen's name or the category of surveyor on an anticipated expert witness list. With regard to good cause for presenting Vugteveen's testimony, the evidence comprising plaintiffs' case in chief included John Gallagher's insistence that prior survey monuments showed that plaintiffs' property extended beyond, and encompassed, the Consumers Energy utility poles. Because plaintiffs' evidence placed squarely in issue the

location of the borders of 6911 Rix Road, and consequently the quantity of trees Consumers Energy improperly cut or removed, the Vugteveen survey possessed probative value toward establishing material facts in issue (the border of plaintiffs' property and tree cutting damages). MRE 401. Furthermore, the record reflects that plaintiffs' counsel had prepared for a potential cross-examination of Vugteveen, given that counsel cross-examined Vugteveen at some length and asked him many questions about whether Vugteveen's survey had comported with the survey principles espoused in two authoritative texts. In light of the high probative value to the defense case inherent in Vugteveen's testimony (good cause), and plaintiffs' knowledge of the Consumers Energy survey well before trial together with their counsel's plainly researched and prepared cross-examination of Vugteveen (minimal surprise/prejudice), *Butt*, 173 Mich App at 321-322,[8] we conclude that the trial court selected an outcome within the range of principled outcomes when it permitted Consumers Energy to elicit Vugteveen's testimony concerning his survey of 6911 Rix Road.

IV. DISALLOWANCE OF REQUESTED JURY INSTRUCTIONS REGARDING ACQUIESCENCE AND ADVERSE POSSESSION

Plaintiffs additionally maintain that because the trial court allowed Consumers Energy to dispute their understanding of the property boundaries at 6911 Rix Road, the trial court should have agreed to instruct the jury that, irrespective of the Vugteveen survey, they still held title to the disputed portion of their property containing the utility poles through acquiescence or adverse possession. Generally, we review de novo claims of instructional error, especially where they involve pure legal questions. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2000); *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 695; 630 NW2d 356 (2001). But "[a] trial court may be entitled to some level of deference under the abuse of discretion standard of review if the decision to give or withhold a certain jury instruction depends on a factual determination." *Hilgendorf*, 245 Mich App at 694.

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[8] In at least somewhat analogous circumstances, this Court in *Butt* explained in relevant part as follows:

> Plaintiffs first claim that the trial court abused its discretion when it allowed defendant to add Robert MacPhee, a private investigator, to his witness list. At trial, . . . [plaintiff] testified that she could not walk without a limp and the aid of a cane, wear heels beyond a certain length, and perform certain chores. Defense counsel hired MacPhee to videotape plaintiff's activities in Arizona. The tape showed plaintiff walking in high heels without the use of a cane, going grocery shopping, driving a car and unloading groceries therefrom. . . . *We hold that the trial court did not abuse its discretion when it allowed MacPhee to testify during rebuttal for the purpose of impeaching plaintiff's testimony and for laying a foundation for the introduction of the videotape*. . . . [T]he case relied on by plaintiffs . . . is distinguishable because *plaintiffs in this case were allowed to voir dire and cross examine MacPhee* and given the opportunity to present plaintiff's testimony in rebuttal. [*Id*. at 321-322 (citations omitted, emphasis added).]

"[W]e examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories *if the evidence supports them.*" *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (emphasis added). "Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice." *Id*., citing MCR 2.613(A).

In support of plaintiffs' contention that the trial court should instruct the jury concerning acquiescence and adverse possession, they cited to the trial court *Mary v Maurer*, 339 Mich 115; 62 NW2d 455 (1954), *Escher v Bender*, 338 Mich 1; 61 NW2d 143 (1953), *Gregory v Thorrez*, 277 Mich 197; 269 NW 142 (1936), *Cotton v McClatchey*, 277 Mich 109; 268 NW 894 (1936), and *Corrigan v Miller*, 96 Mich App 205; 292 NW2d 181 (1980). Four of these cases have no applicability to the instant case because, unlike this case, they involved legal disputes between adjoining property owners in which the doctrines of acquiescence and adverse possession came under consideration. *Mary*, 339 Mich 115; *Gregory*, 277 Mich 197; *Cotton*, 277 Mich 109; *Corrigan*, 96 Mich App 205. The other case, *Escher*, 338 Mich at 2, considered the plaintiff's "action in chancery to set aside a conveyance of real estate on the ground that it was induced by the fraud, misrepresentation and mistake of the defendant." "While the defendant had no survey, he told [the] plaintiff that he knew the extent of his property and pointed out certain fences, trees, water channels and lake shores as marking the property lines." *Id*. at 3. After the plaintiff purchased the property, she arranged for a survey that revealed the property "did not include much of the land, and particularly the lake and river frontage that she had been led to believe she had purchased from the defendant." *Id*. at 3-4. In defense of the plaintiff's action to set aside the transaction, the defendant insisted that he owned the entirety of the parcel he had represented to the plaintiff by virtue of longstanding use of the entire property by the defendant and his predecessor in interest, "without interference or objection by others." *Id*. at 4. The trial court "found that [the] defendant did not have marketable title," and the Michigan Supreme Court affirmed. *Id*. at 2, 5. The Supreme Court rejected the defendant's acquiescence theory, explaining in pertinent part: "We are of the opinion . . . that the rule establishing a boundary line through acquiescence of adjacent owners of land does not apply in the instant case. *This is not an action between 2 property owners disputing ownership to a strip of land lying between their properties*." *Id*. at 7. The Supreme Court proceeded to consider and reject the applicability of an alternate theory, adverse possession:

> To show a record title by adverse possession requires a suit and the recording of a decree.
>
> * * *
>
> The defendant has not quieted title to the property through the statutory proceedings available to him. There is nothing on public record at the present time which could be placed in an abstract to indicate defendant's ownership of the property outside of the boundaries established by the survey. . . . [*Id*. at 8 (internal quotation omitted).

In summary, because this case does not involve a property ownership determination between plaintiffs and the owner of property adjacent to the north, i.e., a railroad, the trial court correctly deemed plaintiffs' requested acquiescence and adverse possession instructions as inapplicable to this case.

V. SETOFF

Plaintiffs lastly dispute the propriety of the trial court's decision to set off against the jury verdict of $11,828 relative to Consumers Energy the pretrial settlement of $20,000 into which codefendant Trees Acquisition had entered. "Whether the jury award in this case is subject to a setoff for the earlier settlement of a codefendant is a purely legal question that is reviewed de novo by this Court. Questions of statutory interpretation are also reviewed de novo." *Kaiser v Allen*, 480 Mich 31, 35; 746 NW2d 92 (2008).

In *Smiley v Corrigan*, 248 Mich App 51, 55; 638 NW2d 151 (2001), this Court summarized as follows the current state of tort liability in Michigan:

> As part of its tort reform legislation, the Michigan Legislature abolished joint and several liability and replaced [it] with "fair share liability." The significance of the change is that each tortfeasor will pay only that portion of the total damage award that reflects the tortfeasor's percentage of fault. . . . The Legislature made its intent to achieve this result very clear through its modifications to a number of statutes and its enactment of new statutes to reflect the changes in Michigan's civil justice system . . . .

For example, in MCL 600.2956, the Legislature

> Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.[9]

The referenced MCL 600.6304 contains the following pertinent language:

> (1) *In an action based on tort* or another legal theory *seeking damages for* personal injury, *property damage*, or wrongful death *involving fault of more than 1 person, including* third-party defendants and *nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer*

[9] The Court noted in *Smiley*, 248 Mich App at 55 n 5, that "[t]he Legislature did not abolish joint and several liability in medical malpractice actions or in cases in which the defendant's act or omission is a crime involving gross negligence or the use of alcohol or controlled substances. See MCL 600.6304(6); MCL 600.6312."

special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) *The percentage of the total fault of all persons that contributed to the death or injury*, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action. [Emphasis added.]

* * *

(8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

In January 2008, plaintiffs and Trees Acquisition settled the trespass claim against Trees Acquisition for $20,000, and on February 6, 2008, the trial court entered an order dismissing Trees Acquisition from the action with prejudice. Consumers Energy at no point thereafter either filed a notice of nonparty fault or urged the trial court to instruct the jury to apportion fault between Consumers Energy and Trees Acquisition. Thus, although Consumers Energy had the right under MCL 600.6308(1) to seek fault apportionment between it and Trees Acquisition,[10] it effectively waived this right by failing to timely preserve the fault allocation issue for trial. See *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998) ("Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, defendants have waived our review of this issue.").

When Consumers Energy belatedly objected after trial to the entry of the $11,828 judgment against it alone, the trial court erred as a matter of law in granting Consumers Energy a setoff in the amount of Trees Acquisition's $20,000 pretrial settlement. The plain language of MCL 600.2956 dictates that "in an action based on tort . . . seeking damages for . . . property damage . . . the liability of each defendant for damages is several only and is not joint." Because the jury found Consumers Energy alone responsible for $11,828 at trial and Consumers Energy neglected to timely seek apportionment of fault between it and Trees Acquisition, under the clear terms of MCL 600.2956 Consumers Energy remains severally responsible for the jury's special verdict against it.

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[10] Testimony at trial revealed that Consumers Energy had a contractual agency relationship with Trees Acquisition, but also that Consumers Energy had itself committed distinct acts of negligence, specifically failing to apprise Trees Acquisition of a special easement relating to 6911 Rix Road and neglecting to arrange for plaintiffs to receive notice of the July 2005 tree trimming in conformity with the 1993 Galloway-Consumers Power easement. These omissions by Consumers Energy fall within the scope of "fault," as defined in MCL 600.6304(8).

Our conclusion that Consumers Energy must bear several responsibility for the entire amount of the jury's special verdict, irrespective of a prior settlement between plaintiffs and codefendant Trees Acquisition, finds further support in another of our Legislature's 1995 tort reforms. The Legislature's amendment of MCL 600.2925d in 1995 PA 161 deleted a subsection that had formerly codified the common-law setoff principle. This Court discussed as follows the amendment and its significance, in pertinent part:

> Before the 1995 tort reform legislation amended the statute, 1995 PA 161, this same statute included a subsection that provided that a settlement and release "reduces the claim against the other tortfeasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater." MCL 600.2925d, added by 1974 PA 318 . . . This language, which represented a codification of the common-law rule of setoff, was apparently deleted because the tort reform legislation, for the most part, abolished joint and several liability in favor of allocation of fault or several liability. MCL 600.2956 and 600.6304. . . . Therefore, *a settlement payment cannot be deemed to constitute a payment toward a loss included in a later damage award entered against the nonsettling tortfeasor*. . . . [*Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 254-255; 660 NW2d 344 (2003) (emphasis added).]

In summary, the trial court erred in awarding Consumers Energy a setoff, and we vacate the court's November 2008 judgment incorporating a setoff and remand for entry of a judgment effectuating the jury's special verdict against Consumers Energy without reference to a setoff.[11]

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[11] Contrary to Consumer's Energy's argument on appeal, our Supreme Court's opinion in *Kaiser*, 480 Mich 31, does not apply to the circumstances of this case. In *Kaiser*, the Supreme Court explained that, "[t]o the extent that joint and several liability principles have not been abrogated by statute, they remain intact, and the common-law setoff rule remains the law in Michigan for vehicle-owner vicarious liability cases." The Supreme Court held in relevant part as follows:

> In vicarious-liability cases, in which the latent tortfeasor's fault derives completely from that of the active tortfeasor, there can be no allocation of fault. *The tort-reform statutes do not apply to allocation of fault in vehicle-owner vicarious-liability cases, because the fault is indivisible* [under MCL 257.401(1)]. Therefore, the common-law setoff rule remains the law in Michigan for vehicle-owner vicarious liability cases. [*Id*. at 36 (emphasis added).]

In this case, the parties agreed that Trees Acquisition had a contractual agency relationship with Consumers Energy, and plaintiffs raised the theory that Consumers Energy had vicarious responsibility for the tree-cutting activities of Trees Acquisition. However, Consumers Energy's position on appeal ignores that the instant case involved distinct omissions for which Consumers Energy had direct responsibility. Because the fault of Consumers Energy and Trees Acquisition is not indivisible here, the statutory several liability scheme applies.

To the extent that Consumers Energy additionally relies on *Markley*, 255 Mich App 245,

(continued…)

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having prevailed in full, we award no costs. MCR 7.219.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher

(…continued)

the portion of that case referenced by Consumers Energy is also distinguishable from the present action. *Markley* arose from a medical malpractice claim, and as this Court observed, *id*. at 251-252, "Under the current statutory scheme, MCL 600.2956 abolished joint liability in most circumstances. However, joint and several liability still exists in medical malpractice cases where the plaintiff is without fault, such as the present case. MCL 600.6304(6)(a)."